Hearing Date and Time: January 19, 2011 at 10:00 A.M. (EST)

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re NEW YORK CITY OFF-TRACK BETTING CORPORATION, Debtor.[1]	Chapter 9 Case No. 09-17121 (MG)

NEW YORK CITY OFF-TRACK BETTING CORPORATION'S STATEMENT IN RESPONSE TO THE MOTION OF DISTRICT COUNCIL 37, LOCAL 2021 FOR APPOINTMENT OF A TRUSTEE

New York City Off-Track Betting Corporation ("NYC OTB") does not consent to the "Motion of District Council 37, Local 2021 for Appointment of Trustee Pursuant to Section 926(a) of the Bankruptcy Code to Pursue Causes of Action to Avoid and Recover Fraudulent Transfers Made to New York Racing Association, Yonkers Racing Corporation, Empire Resorts, Inc., Monticello Raceway Management, Inc.,

[1] NYC OTB's address is 1501 Broadway, New York, NY 10036. NYC OTB's tax identification number is 13-2664509.

Monticello Raceway, Finger Lakes Racing Association, Inc., Delaware North Companies, Delaware North Companies Gaming & Entertainment, Inc., Vernon Downs and Tioga Downs" [Docket No. 247] (the "Trustee Motion") or to the distribution of any funds that may be recovered by a trustee.

FACTS

NYC OTB filed its voluntary petition [Docket No. 1] for relief under chapter 9 of the Bankruptcy Code on December 3, 2009. This Court entered an order for relief (the "Order for Relief") [Docket No. 64] in the case on March 22, 2010. Since the Order for Relief, approximately 130 proofs of claim have been filed in the case. The aggregate face amount of such claims is more than $80,000,000.

NYC OTB ceased substantial operations as of the close of business on December 7, 2010. Presently, NYC OTB's sole activities are related to winding down. NYC OTB intends to complete all such activities by Friday, January 14, 2011, and to terminate its few remaining employees by that date.

NYC OTB filed a motion to dismiss this chapter 9 case [Docket No. 242], which it may do as of right, subject only to notice to creditors as required by the Federal Rules of Bankruptcy Procedure, on December 15, 2010. The hearing on NYC OTB's motion to dismiss the chapter 9 case is scheduled for January 19, 2011, at the same time as the hearing on the Trustee Motion.

In the Trustee Motion, District Council 37, Local 2021 ("DC 37") requests an order appointing a trustee under section 926(a) of the Bankruptcy Code to pursue fraudulent conveyance claims against certain New York race tracks for NYC OTB's payment to the tracks of what has previously been referred to in this case as "Indirect

Commissions". See In re New York City Off-Track Betting Corp., 434 B.R. 131 (Bankr. S.D.N.Y. 2010) (denying motion to compel payment of Indirect Commissions as administrative expense). In that proceeding, NYC OTB acknowledged, and this Court recognized, that NYC OTB had a statutory obligation under the New York Racing, Pari-Mutuel Wagering and Breeding Law to pay the Indirect Commissions to the New York tracks.

DC 37 seeks recovery of those amounts to fund ongoing health care benefits to its former members who retired from employment from NYC OTB. The City of New York (the "City") has announced that it will discontinue such benefits unless reimbursed for any payments it makes. DC 37 has commenced an action against the City and against the State of New York in the Supreme Court for New York County and has obtained a temporary restraining order against the City's discontinuance of the benefits. NYC OTB is not a party to that proceeding but is sympathetic to the plight of the retirees who risk losing their health care benefits as a result, among other things, of the inability of the political process in the New York State Legislature over many years to establish a commission structure that could maintain or restore NYC OTB's financial health. But neither the Supreme Court proceeding nor NYC OTB's sympathy for the retirees affects the application of the law to the Trustee Motion, to which NYC OTB does not consent.

Because the requested relief would have little effect on NYC OTB other than to impede the dismissal and closing of this case, this Statement is limited in scope and depth and is presented primarily to apprize the Court of NYC OTB's position on the Trustee Motion, without extended argument.

ARGUMENT

The Bankruptcy Code does not specify how any money that a trustee recovers is treated. Section 926(a) provides only that "the court may appoint a trustee to pursue such cause of action". It does not provide that the trustee becomes the owner of either the causes of action or of any recovery. Compare 11 U.S.C. § 541(a)(3) (avoiding power recoveries become property of the estate). The phrasing, "pursue such causes of action", suggests instead that the trustee would be exercising only derivative standing, in the way that a creditor or committee may do in a commercial case, with the recovered funds reverting to the debtor. See In re STN Enters., 779 F.2d 901 (2d Cir. 1985).

The legislative history also does not address the question of the disposition of any recoveries. It notes only that a trustee might be appropriate where the debtor itself, for political or other reasons, refuses to pursue avoiding power claims. The legislative history in no way suggests that the trustee would retain any recoveries for distribution as the trustee, the moving party or the court determines.

Such a suggestion may run contrary to section 904 of the Bankruptcy Code, which prohibits the court from interfering, "by any stay, order, or decree, in the case or otherwise … with (1) any of the political or governmental powers of the debtor [or] (2) any of the property or revenues of the debtor" without the debtor's consent. It may also run contrary to section 941 of the Bankruptcy Code, under which only the debtor may propose a plan for the adjustment of its debts and, by implication through section 901's incorporation of section 1123 of the Bankruptcy Code, for the distribution of property to creditors.

In addition, even if a trustee prevailed and recovered funds, DC 37 is not the only claimant that would seek access to the recovered funds. Since the Order for Relief, approximately 130 proofs of claim have been filed seeking more than $80,000,000, and seven creditors have joined the Trustee Motion, seeking application of recovered funds to their claims. Accordingly, DC 37's desire to use the recovered funds solely to fund ongoing health care benefits to its former members may be impractical in light of the competing claims against any recovered assets.

Because NYC OTB intends to complete the process of winding down even before the hearing on the Trustee Motion and to dismiss and close its chapter 9 case promptly, NYC OTB does not consent to the disposition of any amounts that may be recovered by a trustee. Without such consent, this Court would wander into the uncharted territory of a constitutional thicket if it were to determine, or authorize a trustee or a creditor by motion to determine, how avoiding power recoveries were to be distributed.

CONCLUSION

For the foregoing reasons, NYC OTB requests that this Court deny the relief requested in the Trustee Motion.

Dated: January 12, 2011

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